(1) Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

LINDA KATES - Petitioner

vs.

STATE OF OHIO - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MAHONING COUNTY COURT OF APPEALS,
SEVENTH APPELLATE DISTRICT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER THE STATE'S PROSECUTION FOR INVOLUNTARY MANSLAUGHTER BASED ON THE UNDERLYING OFFENSE OF FELONY CHILD ENDANGERING VIOLATED PETITIONER'S FIFTH AMENDMENT RIGHT NOT TO BE TWICE PUT IN JEOPARDY, WHERE THE STATE PREVIOUSLY HAD TRIED AND CONVICTED THE PETITIONER OF THE LESSER INCLUDED OFFENSE OF MISDEMEANOR CHILD ENDANGERING.

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Mahoning County, Ohio Court of Appeals, Seventh Appellate District, the highest state court to review the merits, appears at Appendix A to the petition and is unpublished.

The opinion of the Mahoning County, Ohio Court of Common Pleas appears at Appendix B to the petition and is unpublished.

JURISDICTION

The Mahoning County, Ohio Court of Appeals entered its judgment on February 8, 2000. The Ohio Supreme Court entered its judgment denying review on May 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a), which provides, in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution [of] the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 15, 1997, Petitioner Linda Kates went to the store to buy snacks for her two children, Shayla (8) and Jameeqkwa (5), whom she left at home. During the short amount of time Petitioner was away, Jameeqkwa started a fire in the home. Shayla escaped without harm, but Jameeqkwa was overcome with smoke and asphyxiated.

FIRST PROSECUTION AND CONVICTION

The State of Ohio immediately charged Petitioner with misdemeanor child endangering. According to the *Bill of Particulars* filed in the municipal court, the State sought to prove that "*[o]n or about March 15, 1997, in the City of Youngstown, Mahoning County,*" Linda Kates endangered her **children** when she "*left her* ***children*** *unattended without supervision in the residence creating a risk of harm to* ***Jameeqkwa*** *and* ***Shayla*** *Kates.*"

On May 9, 1997, trial commenced in the case styled State of Ohio v. Linda Kates, Youngstown Municipal Court Case No. 97 CR 487-B. That trial resulted in Petitioner's conviction for misdemeanor child endangering. Petitioner served all of her sentence.

SUBSEQUENT INDICTMENT AND PROSECUTION

On June 6, 1997, one month after her conviction, the State of Ohio indicted Petitioner for the crime of involuntary

manslaughter. The manslaughter indictment was based on the same act of child endangering for which Petitioner had been tried one month earlier.

On July 18, 1997, Petitioner filed a motion to dismiss the indictment, along with an extensive and detailed brief, in the Mahoning County Common Pleas Court. Petitioner specifically raised as grounds the United States' Fifth Amendment and Ohio Article I, Section 10 bars against double jeopardy. The State filed no brief in opposition. On July 25, 1997 the trial court heard oral arguments on the record.

TRIAL COURT'S DECISION

On September 19, 1997, the trial court filed its *Decision* overruling Petitioner's motion to dismiss the indictment. The *Decision* appears as Appendix B to this petition. In its *Decision*, the court made the following express findings:

(1) At the time the City prosecuted [Petitioner] Ms. Kates for the misdemeanor, the incident giving rise to these charges and the results therefrom were complete, so that a Prosecuting Attorney should have known all the charges that could have been brought against this Defendant *[Appendix B, p.1, ¶3]*;

(2) [A] trial on the Child Endangering of Shayla took place on May 9, 1997, with full knowledge of the fact that Defendant's other child, Jameeqkwa Kates, died as a result of a fire at the Kates' home *[Appendix B, p.1, ¶4]*;

(3) There was only one act, one transaction, one animus, the result of which was harm to one child and death to the other *[Appendix B, p.2, ¶3]*;

(4) ***U.S. v. Dixon*** reimposed the "same elements" test . . . wherein two offenses are not the same for double jeopardy purposes if each offense contains an element not contained in the other *[Appendix B, p.2, ¶5]*;

(5) [T]he evidence to be presented in this felony case will certainly be very similar to, and involve the exact same conduct of the Defendant. . . . *[Appendix B, p.3, ¶1]*.

Notwithstanding these findings, the court held that "[j]eopardy does not apply if each crime, (the misdemeanor and the felony) requires proof of an additional **fact** which the other does not." *[emphasis added]*. *[Appendix B, p.3, ¶1]*. Petitioner filed a motion for reconsideration and specifically pointed out that the "same elements" test established in Blockburger v. United States, 284 U.S. 299 (1932) is one of statutory construction, and that the "court's duty is to compare the statutory elements of the offenses without regard to the facts."

The trial court denied Petitioner's motion for reconsideration. On October 29, 1997, Petitioner appeared before the trial court and withdrew her previously-entered plea of "not guilty." She entered a plea of "no contest" to the indictment. On the record, Petitioner expressed, and the trial judge acknowledged, that she would be appealing the conviction on federal and state double jeopardy grounds.

On December 23, 1997, Petitioner was sentenced to three years incarceration plus costs. The court denied Petitioner's oral and written *Motion for Stay of Execution of Sentence*. A stay of execution subsequently was granted by the appellate court.

Petitioner filed a timely appeal. Petitioner's single assignment of error addressed the State's violation of her Fifth Amendment right not to twice be placed in jeopardy. After extensive briefing and argument, the court of appeals affirmed the trial court's judgment on February 8, 2000.

COURT OF APPEALS' OPINION

In its *Opinion*, which appears as Appendix A to this petition, the court of appeals assumed a position contrary to the well-settled holdings of the United States Supreme Court. For example, citing Harris v. Oklahoma, 433 U.S. 682, (*Per curiam* 1977), the appellate court held that the order of convictions in this case – first for child endangering *against Shayla*, then for involuntary manslaughter against "the victim [Jameeqkwa]," – justified the multiple prosecutions and multiple, cumulative sentences. *[Appendix A, p.6]*. (In Harris, this Court reversed the conviction and held: "When . . . conviction of a greater crime . . . cannot be had without conviction of the lesser crime . . . the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.")

However, Brown v. Ohio, 432 U.S. 161, (1977) and State v. Thomas, 61 Ohio St.2d 254, (1980) expressly held that the sequence of prosecutions is immaterial in double jeopardy analysis. These cases and their holdings were presented to – but ignored by – the appellate court.

OHIO SUPREME COURT FINDS APPEAL DOES NOT INVOLVE "ANY SUBSTANTIAL CONSTITUTIONAL QUESTION"

On March 10, 2000, Petitioner filed a timely *Notice of Appeal*, along with a motion to stay execution of the court of appeals' judgment, in the Ohio Supreme Court. On March 24, 2000 Petitioner filed her timely *Memorandum in Support of Jurisdiction* as a claimed appeal of right. The **only** question presented was whether the State had violated Petitioner's "right not to be twice placed in jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution."

On May 31, 2000 the Ohio Supreme Court filed the following *Entry*: "Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and **dismisses the appeal as not involving any substantial constitutional question.**" *[emphasis added]*.

Petitioner has been in prison since June 28, 2000.

REASONS FOR GRANTING THE WRIT

In its one-sentence *Entry*, the Ohio Supreme Court dismissed Petitioner's appeal as "not involving any substantial constitutional question." It is difficult to imagine any question more substantial than that involving a State's violation of a citizen's right contained in the Bill of Rights.

The prohibition against double jeopardy is one of the most sacred tenets of the constitutional history of our country. It is a sound and substantial principle of law and society, and, in Petitioner's case, it was violated.

Petitioner Linda Kates left her two minor children alone while she went to the store to buy them some snacks. While she was gone, a fire broke out in the home. Shayla escaped, but Jameeqkwa died of smoke inhalation.

On May 9, 1997, Petitioner was tried in the Youngstown Municipal Court for the offense of endangering children. According to its *Bill of Particulars*, the State attempted to prove that:

> On or about March 15, 1997 in the City of Youngstown, Mahoning County, State of Ohio, the Defendant, Linda Kates with regard to Case No. 97 CR 487 B did create a substantial risk to the health or safety of her daughter Shayla Kates, who is under eighteen (18) years of age by violating her duty of care, protection or support in violation of Section 2919.22(A) of the Ohio Revised Code.
>
> Further, the State of Ohio will prove that the Defendant left her children unattended without supervision in the residence creating a **risk of harm to Jameeqkwa *and* Shayla Kates.** In addition the residence was without water or electricity resulting in a precarious and dangerous condition. In particular, a fire resulted causing injury to the children when left unattended. *[emphasis added] Bill of Particulars*, filed in the Youngstown Municipal Court on April 21, 1997.

The Youngstown Municipal Court found Petitioner guilty of child endangering and imposed sentence.

Less than one month later, the State indicted Petitioner for the crime of involuntary manslaughter based on her having endangered her children. The State's *Indictment for Involuntary Manslaughter* against Ms. Kates stated, in relevant part:

> [O]n or about the 15th day of March, 1997, at Mahoning County, LINDA KATES did cause the **death of Jameeqkwa Kates** as a proximate result of LINDA KATES' *committing or attempting to commit a felony, to wit: Endangering Children*, in violation of Section 2919.22(A)(E)(2)(c) of the Revised Code. In violation of Section 2903.04(A)(C) of the Revised Code, a Felony of the First Degree, against the peace and dignity of the State of Ohio.

On its face, the subsequent indictment accused Petitioner of the same criminal offense — child endangering — occurring on the same date — March 15, 1997.

Child endangering, whether misdemeanor or felony, is a lesser included offense of involuntary manslaughter. Because the State had insisted on going forward with the first child endangering prosecution in the municipal court, it was barred from subsequently prosecuting Petitioner for involuntary manslaughter based on child endangering arising from the exact same date, time and circumstances.

The Fifth Amendment's Double Jeopardy Clause provides:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

This provision, enforceable against the States through the Fourteenth Amendment (Benton v. Maryland, 395 U.S. 784, 794 (1969)), protects an accused against a second prosecution for the same offense, irrespective of whether the first prosecution resulted in acquittal or conviction. Brown v. State of Ohio, 432 U.S. 161, 194 (1977).

According to Blockburger v. United States, 284 U.S. 299 (1932), the offenses for which Petitioner was successively prosecuted and cumulatively sentenced are the "same" for double jeopardy purposes. Under every double jeopardy test, Petitioner should have been immune to prosecutions after her first conviction in the municipal court. She had been punished; she was entitled to freedom from further prosecution and additional punishment.

While the trial court acted in good faith, it nevertheless misapplied this Court's well-settled decisions. The appellate court went one step further: it blatantly misstated the law. The appellate court – the highest court to decide the merits of Petitioner's case – assumed a position contrary to every relevant decision this Honorable Court has issued. It bastardized not only the law of the land, but – more importantly – the process. The appellate court's *opinion* consisted of distorted rationalizations and utter and egregious disregard for well settled, *thoughtful* double jeopardy analysis and United States Supreme Court decisions.

For example, in claimed reliance on Harris v. Oklahoma, 433 U.S. 682 (*Per curiam* 1977), the appellate court held that **the order of convictions** in this case – first for child endangering against Shayla, then for involuntary manslaughter against "the victim [Jameeqkwa]," – justified the multiple

prosecutions and multiple, cumulative sentences. The appellate court stated:

> The facts of Harris, supra, were also distinguished from the case at bar because that case involved a conviction for felony murder and a subsequent conviction for the underlying felony. In the present matter, appellant was not first convicted of involuntary manslaughter and then convicted of the underlying felony of felonious child endangering. Instead, appellant was convicted of child endangering against Shayla, then convicted of a separate offense of involuntary manslaughter against the victim. Therefore, appellant's conviction for involuntary manslaughter did not violate the double jeopardy clause of the United States or Ohio Constitutions. *[Appendix A - pp.13-14].*

In Harris, this Court held: "When . . . conviction of a greater crime . . . cannot be had without conviction of the lesser crime . . . the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." Brown v. Ohio, 432 U.S. 161 (1977) and State v. Thomas, 61 Ohio St.2d 254 (1980), which do not conflict with Harris, expressly held that the sequence of prosecutions is immaterial in double jeopardy analysis. These cases and their holdings were presented to – but ignored by – the appellate court. Also ignored by the appellate court was the fact that Jameeqkwa already had been named as one of the victims in the first prosecution's *Bill of Particulars.*

In addition, the appellate court attempted to divide an admittedly single, isolated act – mere absence – into two into arbitrary parts and call each part a separate offense: one act of

absence for each victim. This is exactly the kind of bootstrapping and legal hair-splitting denounced in Brown, supra, wherein the Court stated: "The Double Jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units. . . ."

Nevertheless, even if Petitioner's isolated instance of leaving her children unattended somehow could be divided into two separate acts, her successive prosecutions and punishments still could not be upheld. In Brown, supra, the Court held that "[t]he greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Brown at 166.

By definition – by the very plain wording of the involuntary manslaughter statute – an offense underlying involuntary manslaughter is a lesser included of involuntary manslaughter. Taking the analysis one step further, there can be no doubt that the misdemeanor offense of "endangering children" is a lesser included offense of felony "endangering children."

In Blockburger, supra, this Court held that when the same act or transaction constitutes a violation of two distinct statutes, the test to be applied to determine whether there are two "offenses" for purposes of the Double Jeopardy Clause of the United States Constitution is whether each **statute** "requires proof of an additional fact which the other does not." This is known also as the "same elements" test. Unless **each** statute contains an element not included in the other, a Defendant convicted or acquitted of a violation of one may not be

prosecuted for a violation of the other based upon the same incident. *Id.*

In the case at bar, the Blockburger analysis begins with a review of the involuntary manslaughter statute, R.C. § 2903.04(A). A conviction for involuntary manslaughter requires proof of the underlying crime of child endangering and, in addition, a homicide proximately resulting from the underlying child endangering. *See* State v. Liberatore, 4 Ohio St.3d 13, 15 (*Per Curiam* 1983). A conviction for child endangering requires no more than proof of child endangering. Therefore, child endangering does not "require proof of an additional fact which the other [involuntary manslaughter] does not."

In Brown, supra, the Court held:

> As is invariably true of a greater and lesser included offense, the lesser offense . . . requires no proof beyond that which is required for conviction of the greater offense . . .. **The greater offense is therefore by definition the "same" for purposes of double jeopardy as any lesser offense included in it.** *[emphasis added]* *Id.* at 168.

Furthermore, Harris, supra, held that "When . . . conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."

Because proof of child endangering is essential to establishing a statutory element of involuntary manslaughter, and because the failure of proof of child endangering would absolutely preclude a conviction for involuntary manslaughter, by definition, the crime of child endangering is a lesser included of involuntary manslaughter. Therefore, involuntary manslaughter and its lesser included offense of child endangering are the "same" under Blockburger and cannot be tried separately in consecutive prosecutions.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

30 October 2000

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STATE OF OHIO, PLAINTIFF-APPELLEE

v.

LINDA KATES, DEFENDANT-APPELLANT

CASE NO. 97 C.A. 252.

7th District Court of Appeals of Ohio, Mahoning County.

Decided on February 8, 2000.

Criminal Appeal from Mahoning County Common Pleas Court, Case No. 97 CR 381.

For Plaintiff-Appellee: Atty. Paul J. Gains, Prosecuting Attorney, Atty. Janice T. O'Halloran, Asst. Prosecuting Attorney, Mahoning County Courthouse, Youngstown, Ohio 44503.

For Defendant-Appellant: Atty. Steven M. Goldberg, Atty. J. Michael Goldberg, Summit Professional Centre, 6600 Summit Drive, Canfield, Ohio 44406.

Hon. Edward A. Cox, Hon. Joseph J. Vukovich, Hon. Cheryl L. Waite.

OPINION

COX, P.J.

This matter presents a timely appeal from a judgment rendered by the Mahoning County Common Pleas Court, finding defendant-appellant, Linda Kates, guilty of involuntary manslaughter, in violation of R.C.2903.04(A), and sentencing her to a definite, three year incarceration term.

Appellant had two children, an eight year old daughter, Shayla Kates (Shayla), and a five year old son, Jameeqwa Kates (the victim). Appellant was renovating a newly purchased residence and on the evening in question, she brought her children to this residence. (Tr. 5). The home was filled with debris, had boarded windows and was without electricity, therefore, appellant placed candles throughout the house. (Tr.

3-4). Appellant had to complete an errand and left her two children unattended. (Tr. 13). During the twenty minutes that appellant was gone, one of the candles fell over, starting a fire which consumed the home. (Tr. 3). Shayla managed to escape the house, however the victim was unable to escape and died of smoke inhalation.

Appellant was first charged and convicted by the Youngstown Municipal Court of child endangering, in violation of R.C. 2919.22(A), against her daughter Shayla. Thereafter, on June 6, 1997, appellant was indicted for involuntary manslaughter, in violation of 2903.04(A), against the victim. The underlying felony for the involuntary manslaughter was felonious child endangering.

On July 18, 1997, appellant filed a motion to dismiss the indictment, claiming that she had previously been convicted of child endangering and her charge of involuntary manslaughter subjected her to double jeopardy. The trial court denied such motion. Appellant then filed a motion for reconsideration on the double jeopardy claim and the trial court denied same. On October 29, 1997, appellant withdrew her previous not guilty plea and entered a no contest plea to the involuntary manslaughter charge. The trial court found appellant guilty and sentenced her to a definite, three year incarceration term. This appeal followed.

Appellant's sole assignment of error alleges:

"THE TRIAL COURT'S FAILURE TO DISMISS THE STATE'S INDICTMENT ON DOUBLE JEOPARDY GROUNDS CONSTITUTED ERROR AS A MATTER OF LAW."

The Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution protect defendants from double jeopardy. The United States Supreme Court, in Benton v. Maryland (1969), 395 U.S. 784,

held that the double jeopardy prohibition of the Fifth Amendment is applicable to the states through the Fourteenth Amendment.

In Blockburger v. U.S. (1932), 284 U.S. 299, the United States Supreme Court set forth the "same elements" test to be used to determine whether the same act violates two statutory provisions as it pertains to double jeopardy. The United States Supreme Court established another test in Harris v. Oklahoma (1977), 433 U.S. 682. A third test was established by the United States Supreme Court in Grady v. Corbin (1990), 495 U.S. 508, which prohibited a second prosecution of a crime arising from the same criminal act. However, in U.S. v. Dixon (1993), 509 U.S. 688, the United States Supreme Court overruled its decision in Grady, supra, and returned to the "same elements" test of Blockburger, supra. In State v. Thomas (1980), 61 Ohio St.2d 254, 261, the Ohio Supreme Court adopted the Blockburger and Harris tests. In adopting these two tests, the Ohio Supreme Court in Thomas, supra, stated:

> "* * * The import of Harris is that a person may not be subjected to multiple prosecutions when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct.
>
> "Basically, two questions may be posed in arriving at the solution to the ultimate issue presented here. One is whether the offenses of robbery and involuntary manslaughter are distinguishable under the Blockburger standard; i.e., do each of the crimes of robbery and involuntary manslaughter require proof of a fact which the other does not?
>
> "Two, there being a less serious offense for which the defendant has been previously tried, is the state prohibited from relitigating the factual issues already

resolved in the prior trial, or do the facts of this case present an exception to the general rule prohibiting multiple prosecutions?"

In State v. Tolbert (1991), 60 Ohio St.3d 89, the Ohio Supreme Court reaffirmed the two part test set forth in Thomas, supra.

In the present matter, appellant argues that the trial court should have granted her motion to dismiss the indictment for involuntary manslaughter because she had previously been convicted of child endangering on the same factual basis. Appellant argues that since the underlying felony in this case was child endangering and since the failure to prove child endangering would absolutely preclude a conviction for involuntary manslaughter, by definition, the crime of child endangering is a lesser-included offense of involuntary manslaughter. Appellant maintains that involuntary manslaughter and child endangering cannot be tried separately because they constitute the same offense, and to do so would violate the double jeopardy clause. Therefore, appellant maintains that her involuntary manslaughter conviction failed the test as set forth in Blockburger, supra, and subjected her to double jeopardy.

Appellant sets forth cases in support of her position that the involuntary manslaughter action was barred. Appellant cites Brown v. Ohio (1977), 432 U.S. 161, wherein the United States Supreme Court held that a defendant could not first be tried and convicted of joyriding and subsequently charged and convicted of stealing an automobile. The United States Supreme Court stated that to do so would violate double jeopardy, since joyriding is a lesser-included offense of stealing an automobile. Appellant also cites State v. Donald (1979), 57 Ohio St.2d 73, wherein the Ohio Supreme Court held that the conviction of two crimes is prohibited by statute where both

crimes are motivated by a single purpose and both convictions rely upon identical conduct and the same evidence. Appellant further cites the facts from Harris, supra, wherein the United States Supreme Court held that the defendant could not be convicted of felony murder and subsequently convicted of robbery with firearms if both offenses arose from the same act.

In Thomas, supra, the Ohio Supreme Court viewed both R.C. 2903.04, for involuntary manslaughter, and R.C. 2911.02, for robbery, separately in order to determine whether both statutes required proof of a fact which the other did not. The Ohio Supreme Court did not find a per se double jeopardy violation merely because robbery was the underlying felony for the subsequent involuntary manslaughter charge. Therefore, in the case at bar, to test the statute under Blockburger, supra, as adopted by the Ohio Supreme Court in Thomas, supra, the statutes for both involuntary manslaughter and felonious child endangering must be reviewed to determine whether both require proof of an element which the other does not. Child endangering and felonious child endangering are defined under R.C. 2919.22, which states, in pertinent part:

> "2919.22 Endangering children
>
> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means

through prayer alone, in accordance with the tenets of a recognized religious body.

"* * *

"(E)(1) Whoever violates this section is guilty of endangering children.

(2) If the offender violates division (A) or (B) (1) of this section, endangering children is one of the following:

"(a) Except as otherwise provided in division (E)(2)(b) or (c) of this section, a misdemeanor of the first degree;

"* * *

"(c) If the violation results in serious physical harm to the child involved, a felony of the third degree."

Involuntary manslaughter is governed by R.C. 2903.04(A), which states:

"2903.04 Involuntary manslaughter

"(A) No person shall cause the death of another or the unlawful termination of another's pregnancy as a proximate result of the offender's committing or attempting to commit a felony."

A review of these statutes demonstrates that each requires proof of a fact which the other does not. Felonious child endangering requires proof of parental neglect causing a substantial risk of harm to a person under eighteen years of age that results in serious physical harm to the child, which is not a requirement for involuntary manslaughter. Involuntary manslaughter requires proof of the death of another, which is not a requirement for felonious child endangering. Therefore, both statutes require proof of an additional fact which the other does not, thus satisfying the test as set forth in Blockburger, supra, and passing the first test in Thomas, supra.

In viewing a double jeopardy claim under Thomas, supra, an additional test must be satisfied. The second test as adopted by the Ohio Supreme Court from Harris, supra, prohibits charging a defendant with an offense when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct. Under this test double jeopardy prohibited appellee from relitigating the factual issues already resolved in the prior trial. Therefore, if appellee had to prove that appellant committed child endangering against Shayla to prove involuntary manslaughter against the victim, appellee would have relitigated a fact which was resolved from a previous trial. This would have been prohibited by double jeopardy.

In the case at bar, appellee did not have to prove that appellant was guilty of child endangering of Shayla in order to convict appellant of involuntary manslaughter of the victim because there were two separate offenses and two victims. The underlying felony for appellant's involuntary manslaughter conviction was felonious child endangering. Appellee had to prove that appellant committed felonious child endangering of her son, the victim, to have an underlying felony upon which to base a charge of involuntary manslaughter under R.C. 2903.04(A). To prove felonious child endangering under R.C. 2919.22(E)(2)(c), appellee had to prove that the victim suffered serious physical harm as a result of appellant committing child endangering against him. Appellee proved that the victim suffered serious physical harm because he died as a result of appellant's actions. Appellant's prior child endangering conviction regarding Shayla was not an issue in appellant's subsequent trial for involuntary manslaughter. Therefore, the subsequent involuntary manslaughter conviction under R.C. 2909.04(A) passed the test as set forth in Harris, supra, and as adopted by the Ohio Supreme Court in Thomas, supra.

Moreover, Brown, supra, and Donald, supra, to which appellant cites, are distinguished from the case at bar. In those cases there was one victim, but in the case at bar, appellant engaged in one offense of child endangering against Shayla, and a second offense of involuntary manslaughter against the victim. As previously stated, appellee did not have to prove the offense of child endangering against Shayla to obtain a conviction for involuntary manslaughter against appellant with regards to the victim. The facts of Harris, supra, were also distinguished from the case at bar because that case involved a conviction for felony murder and a subsequent conviction for the underlying felony. In the present matter, appellant was not first convicted of involuntary manslaughter and then convicted of the underlying felony of felonious child endangering. Instead, appellant was convicted of child endangering against Shayla, then convicted of a separate offense of involuntary manslaughter against the victim. Therefore, appellant's conviction for involuntary manslaughter did not violate the double jeopardy clause of the United States or Ohio Constitutions.

Appellant's sole assignment of error is found to be without merit.

The judgment of the trial court is affirmed.

Vukovich, J., concurs. Waite, J. concurs.

STATE OF OHIO, PLAINTIFF

v.

LINDA KATES, DEFENDANT

CASE NO.97-CR-381

DECISION

Judge R. Scott Krichbaum

Hearing had upon Defendant's Motion to Dismiss on July 25, 1997. Defendant's Motion is based upon a claim that the State's Prosecution under this Case Number is prohibited by the United States and Ohio Constitution's double jeopardy provisions.

In this case, the Defendant, Linda Kates, is accused of causing the death of her child, Jameeqkwa Kates, as a proximate result of her committing or attempting to commit Endangering Children, a felony violation of ORC.2919.22(A)(E)(2)(c). The Defendant was previously charged and convicted of misdemeanor Child Endangering under the exact same code section 2919.22(A) in trial in the Youngstown Municipal Court regarding the Child Endangering of her daughter, Shayla Kates.

At the time the City prosecuted Ms. Kates for the misdemeanor, the incident giving rise to these charges and the results therefrom were complete, so that a Prosecuting Attorney should have known all the charges that could have been brought against this Defendant.

It is the Court's understanding that a trial on the Child Endangering of Shayla took place on May 9, 1997, with full knowledge of the fact that Defendant's other child, Jameeqkwa Kates, died as a result of a fire at the Kates' home. It is Defendant's contention that the prosecution of that

misdemeanor bars prosecution of the felony herein because of the fact that the misdemeanor tried involves exactly the same act, transaction and animus as the felony before this Court. That is, Ms. Kates is alleges to have left her two children at home unattended and that a fire occurred during her absence, which resulted in injury to one child and death to another. Obviously, Defendant's criminal culpability for whatever occurred is defined by her act of leaving the children unsupervised for a period of time during which a fire occurred.

The Fifth Amendment to the U.S. Constitution provides, inter alia, "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." The Ohio Constitution, Article I, Section 10 provides that "no person shall twice be put in jeopardy for the same offense." The Federal Constitution protection against double jeopardy is applicable to Ohio cases under ***Benton v. Maryland*, 395 U.S. 784 (1969)**.

The Double Jeopardy clause protects an individual against multiple prosecutions for the same offense whether the defendant is convicted or acquitted in the first prosecution. The clause further protects one against multiple punishments for the same offense.

"Same offense" does not mean "same charge," rather, it relates to the criminal CONDUCT itself. In this case, the criminal conduct of the defendant was the act of leaving her young children unattended, thereby "creating a substantial risk to the health or safety of the children." There was only one act, one transaction, one animus, the result of which was harm to one child and death to the other.

The U.S. Supreme Court in ***Grady v. Corbin*, 495 U.S. 508(1990)** held in a 5-4 decision that a second prosecution of crime arising from the same criminal act is prohibited if, to establish an essential element of an offense charged in that

prosecution, the government will prove conduct that constitutes an offense for which the accused already has been prosecuted. Under Grady, the prosecution of this case would clearly be prohibited.

However, the Supreme Court revisited the same issue in 1993 in U.S. v. Dixon and Foster, 125 L.Ed 2d 556, and again in a 5-4 decision, reversed Grady v. Corbin and reimposed the "same elements" test it had earlier established, wherein two offenses are not the same for double jeopardy evaluation purposes if each offense contains an element not contained in the other.

Defendant claims that under the Blockburger Test, (Blockburger vs. United States, 284 U.S. 299 (1932)), both the Misdemeanor tried in the Municipal Court and the Felony indicted in this Court have identical statutory elements and/or that the misdemeanor is a lesser included offense of the felony and, as a consequence, since the misdemeanor was already tried, this prosecution is barred. However, it appears to this Court upon close review of the charges herein, that the Misdemeanor charge of Child Endangering claims that the act of Linda Kates did create a substantial risk to the health or safety of Shayla Kates, and that the Felony charge of Involuntary Manslaughter involves an allegation that the act of Linda Kates did cause the death of Jameeqkwa Kates as a proximate result of Linda Kates Committing the Felony of Endangering Children.

Although the evidence to be presented in this felony case will certainly be very similar to, and involve the exact same conduct of the Defendant, it involves a victim different from the victim in the misdemeanor case that was already tried. Jeopardy does not apply if each crime, (the misdemeanor and the felony) requires proof of an additional fact which the other does not. Therefore, since each of these offenses requires proof of an element that the other does not, the Constitutional

protection against double jeopardy does not operate herein to bar this present prosecution.

It should be evident that a single criminal act or transaction may, and often does result in the commission of several offenses. Oftentimes, a single criminal act can involve several victims, and, as such, the harm to each of those victims can and should be considered separate criminal offenses. The preferred and proper method in such situations is to prosecute the defendant for all those crimes in a single trial, so that the defendant is not subjected to the expense and trauma of multiple criminal prosecutions. The government should not be permitted to prosecute the defendant ten separate times if all ten cases arose from the same original criminal act.

The double jeopardy protection against multiple prosecutions recognizes that the omnipotent power and unlimited finances of the government create an unfair mismatch against an individual citizen, obviously not so well equipped. Nonetheless, the U.S. Supreme Court has held that the same elements test is all that matters.

Therefore, this Court finds that separate criminal charges can be brought for crimes committed against each of the victims in this case, and that the Prosecution in Municipal Court for the crime committed against the victim, Shayla Kates, does not invoke the Constitutional Protection against double jeopardy to prohibit the Prosecution of the Defendant for a different crime against a different victim, Jāmeeqkwa Kates in this Court of Common Pleas.

Therefore, it is the Judgment of this Court that the Motion to Dismiss on Double Jeopardy Grounds should be and hereby is overruled.

Filed September 19, 1997

/s/
Judge R. Scott Krichbaum

The Supreme Court of Ohio
State of Ohio, Appellee
v.
Linda Kates, Appellant.
NO. 00-464
July 12, 2000

RECONSIDERATION DOCKET

On motion for reconsideration. Motion denied.

Reported at 88 Ohio St.3d 1442, 725 N.E.2d 283.

The Supreme Court of Ohio
State of Ohio, Appellee,
v.
Linda Kates, Appellant.
NO. 00-464
May 31, 2000

DISMISSALS, SUA SPONTE, NO SUBSTANTIAL CONSTITUTIONAL QUESTION AND DISCRETIONARY APPEALS, IF APPLICABLE, NOT ALLOWED

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

Reported at 729 N.E.2d 381 (Ohio).

Supreme Court, U.S.
FILED
NOV 28 2000
CLERK

(2)

NO. 00-703

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

LINDA KATES - Petitioner

v.

STATE OF OHIO - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE OHIO COURT OF APPEALS SEVENTH JUDICIAL DISTRICT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Appellant had two children, an eight year old daughter, Shayla Kates, and a five year old son, Jameeqwa Kates. Appellant was renovating a newly purchased residence and on the evening in question brought her children to the residence. The home was filled with debris, had boarded windows and was without electricity, so Appellant placed candles throughout the house. She left her two children unattended while she went to run an errand. During the twenty minutes that Appellant was gone, one of the candles fell over, starting a fire which consumed the home. Shayla managed to escape the house, however, Jameeqwa was unable to escape and died of smoke inhalation.

The City of Youngstown charged Appellant with child endangering, in violation of O.R.C. 2919.22(A), for creating a substantial risk to the health or safety of her eight year old daughter, Shayla Kates, by violating a duty of care, protection or support. On May 9, 1997 the appellant was tried and convicted of child

endangering in the Youngstown Municipal Court. The Mahoning County Grand Jury on June 6, 1997 indicted the Appellant for involuntary manslaughter, in violation of O.R.C. 2903.04(A)(C). (Docket, hereinafter referred to as "D." 2). Appellant was charged with causing the death of her five year old son, Jameeqwa Kates, as a proximate result of Appellant committing or attempting to commit the felony of endangering children, in violation of O.R.C. 2903.04(A). (D.2). On July 18, 1997, Appellant filed a motion to dismiss the indictment. (D.14). The trial court issued a decision on September 19, 1997, that overruled Appellant's motion. (D. 17). The court found that separate criminal charges could be brought for crimes committed against the separate victims.(D. 17). Also, the court held that the prosecution in municipal court for crimes committed against one victim does not invoke constitutional protection against double jeopardy to prohibit prosecution of Appellant for a different crime against a different victim. (D.17).

Appellant filed a motion for reconsideration regarding her motion to dismiss the indictment on October 15, 1997. (D. 18). The trial court again overruled Appellant's motion. (D. 22). On October 29, 1997, Appellant entered a plea of no contest to the charge of involuntary manslaughter. (D. 25). Appellant was sentenced on December 23, 1997, to serve three years at the Marysville Reformatory. (D. 28). On February 8, 2000, the Seventh District Court of Appeals overruled Appellant's assignment of error and affirmed the decision of the Common Pleas Court of Mahoning County, Ohio. While appellant sought review by the Ohio Supreme Court, that court denied her appeal on May 31, 2000.

REASONS FOR OPPOSING WRIT

I

WHEN CRIMINAL ACTIONS CAUSE HARM TO MORE THAN ONE VICTIM DOUBLE JEOPARDY DOES NOT PREVENT PROSECUTION FOR THE CRIMES AGAINST THE SEPARATE VICTIMS.

Appellant was tried and convicted of child endangering, a violation of O.R.C. 2919.22(A), in Youngstown Municipal Court, for

creating a substantial risk of harm to her eight year old daughter, Shayla Kates. O.R.C. 2919.22 provides in pertinent part:

> (A) No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support . . .
> (E)(1) Whoever violates this section is guilty of endangering children.
> (2) If the offender violates division (A) or (B)(1) of this section, endangering children is one of the following:
> (a) Except as otherwise provided in division (E)(2)(b) or (c) of this section, a misdemeanor of the first degree . . .
> (c) If the violation results in serious physical harm to the child involved, a felony of the third degree.

Appellant was indicted for involuntary manslaughter, a violation of O.R.C. 2903.04(A), for causing the death of her five year old son, Jameeqwa Kates. She entered a plea of no contest in the Mahoning County Court of Common Pleas. O.R.C. 2903.04(A) states that "[n]o person shall cause the death of another. . .as a proximate result of the offender's committing or attempting to commit a felony." O.R.C. 2903.04(C) provides that "[w]hoever violates this

section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree."

Each statutory provision which Appellant was charged with requires proof of at least one additional fact that the other does not. Felonious child endangering requires proof of parental neglect causing a substantial risk of harm to a person under eighteen years of age that results in serious physical harm to the child, which is not a requirement for involuntary manslaughter. Involuntary manslaughter requires proof of the death of another, which is not a requirement of felonious child endangering. Thus, both statutes require proof of an additional fact which the other does not, satisfying the test as set forth by this Court in Blockburger v. U.S. (1932) 284 U.S. 299.

The second test as adopted by this Honorable Court in Harris v. Oklahoma (1977) 433 U.S. 682 prohibits charging a defendant with an offense when proof of the one offense is necessary, as a practical matter, to prove the other, and both completed offenses arose out of the same criminal conduct. Under this test, double

jeopardy prohibits courts from relitigating factual issues already resolved in a prior trial.

In the case at bar, the State did not have to prove that Appellant was guilty of child endangering of her daughter, Shayla, to convict her of involuntary manslaughter of her son, Jameeqwa, because there were two separate offenses and two victims. The underlying felony for Appellant's involuntary manslaughter conviction was the felonious child endangering of her son. The State proved that Jameeqwa Kates suffered serious physical harm, his death, as a result of Appellant committing child endangering against him. The Appellant's prior child endangering conviction involving her daughter, Shayla Kates, was not an issue in Appellant's subsequent trial for the involuntary manslaughter of her son, Jameeqwa Kates. Thus Appellant's conviction for involuntary manslaughter of her son passed the test as set forth in Harris, supra and adopted by the Ohio Supreme Court in State v. Thomas (1980) 61 Ohio St. 2d 254.

The test for establishing whether a single act or transaction

that violates two distinct statutory provisions constitutes the "same offense" for purposes of a double jeopardy analysis is whether each statute requires proof of a fact that the other does not. Blockburger v. United States, supra, at 304. The act of appellant, leaving her children at home unattended, resulted in her conviction for child endangering of her daughter and a separate conviction for involuntary manslaughter of her son. Each statute requires additional proof that the other does not require, therefore, appellant's conviction for involuntary manslaughter did not violate the double jeopardy clause of the United States or Ohio Constitutions.

The Appellant's sole claim arises from the refusal of the trial court to grant her motion to dismiss this prosecution based upon the doctrine of double jeopardy. The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution Amendment V. Section 10, Article 1 of the Ohio Constitution contains a similar provision that "[n]o person shall

be twice put in jeopardy for the same offense." The Federal Constitution protection against double jeopardy is applicable to Ohio cases under Benton v. Maryland (1969), 395 U.S. 784.

In Blockburger v. United States (1932), 284 U.S. 299, 304, the United States Supreme Court held that, when the same act or transaction constitutes a violation of two distinct statues, the test to be applied to determine whether there are two offenses for purposes of the Double Jeopardy Clause of the United States Constitution is whether each statute "requires proof of an additional fact which the other does not." Unless each statute includes an element not included in the other, a defendant convicted or acquitted of a violation of one may not be prosecuted for a violation of the other based upon the same incident. The United States Supreme Court established another test in Harris v. Oklahoma (1977), 433 U.S. 682. Ohio adopted the Blockburger and Harris tests in State v. Thomas (1980) 61 Ohio St. 2d 254.

The appellant's reliance on Brown v. Ohio (1977), 432 U.S.

161 is misplaced. In Brown, the Court reasoned that the Double Jeopardy Clause bars prosecution for the crime of stealing an automobile following prosecution and punishment for the lesser included offense of joyriding. The Court also found that there was only one offense and the defendant could not twice be placed in jeopardy for the same offense. Appellant's case is easily distinguished from Brown v. Ohio. Appellant was first prosecuted for child endangering her eight year old daughter in Youngstown Municipal Court. Appellant was later indicted and entered a plea of no contest to the charge of involuntary manslaughter in the Mahoning County Court of Common Pleas for the death of her five year old son. The offense of child endangering of Appellant's daughter is not a lesser included offense of the involuntary manslaughter of Appellant's son. There were two separate victims of two separate offenses.

The appellant also improperly relies on Harris v. Oklahoma (1977), 433 U.S. 682. In Harris, the Court found that the Double Jeopardy Clause of the Fifth Amendment barred a separate

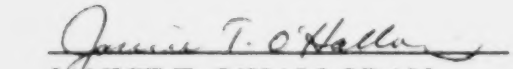
prosecution for the lesser crime of robbery with firearms, since a conviction of the greater crime of felony murder could not be had without conviction of the lesser crime. Appellant's case is not analogous to Harris. Appellant was not first convicted of involuntary manslaughter and then convicted of the underlying felony of felonious child endangering. In order to convict Appellant of the involuntary manslaughter of her five year old son, Jameeqwa Kates, the court did not have to find Appellant guilty of the child endangering of her eight year old daughter, Shayla Kates. Thus, Appellant's reliance on this case is also misplaced.

CONCLUSION

WHEREFORE, based upon the foregoing law and argument, Appellee respectfully submits that the trial court correctly overruled the Appellant's motion to dismiss the indictment. The appellate court correctly affirmed the conviction since this conviction for involuntary manslaughter did not violate the double jeopardy clause of the United States or Ohio Constitutions. There is no constitutional violation for

this court to review. As a result, the petition for certiorari must be dismissed.

Respectfully submitted,



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No. 00-703

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IN THE
SUPREME COURT OF THE UNITED STATES

LINDA KATES - Petitioner

vs.

STATE OF OHIO - Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE MAHONING COUNTY COURT OF APPEALS,
SEVENTH APPELLATE DISTRICT OF OHIO

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. A SINGLE FAILURE TO ACT MAY NOT ARBITRARILY BE DIVIDED INTO TWO OR MORE SEPARATE ACTS TO PERMIT MULTIPLE PROSECUTIONS. ACCORD, BROWN V. OHIO, 432 U.S. 161 (1977)

Petitioner Linda Kates' criminal conduct involved leaving her two children at home unattended. She left, and she returned. Within that single time frame, fire consumed her home, and smoke claimed her son Jameeqkwa.

Petitioner's *absence* – her failure within that single time frame to be at home with her two children – constituted a failure to act for which she was charged criminally. And prosecuted twice.

The State proposes that "When criminal *actions* cause harm to more than one victim double jeopardy does not prevent prosecution for the crimes against the separate victims." Yet, the State has failed to present even a single case to support its proposition, which presumes multiple acts by Petitioner. Moreover, the State's presumption finds no factual support in the Record, which reflects the trial court's express finding that "the misdemeanor tried involves exactly the same act, transaction and animus as the felony. . . ." *[Petition for Writ of Certiorari, Appendix B, p.2, ¶3].*

The State asserts – as it has throughout these proceedings – that Petitioner's single, measurable absence should be divided into two separate acts because there were two victims. However, in Brown v. Ohio, 432 U.S. 161 (1977), this Honorable Court squarely denounced this type of bootstrapping, stating that "The Double Jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the

simple expedient of dividing a single crime into a series of temporal or spatial units. . . ."

In any event, the state conveniently has ignored the fact that *both* children were specifically named in the bill of particulars filed in the *first* prosecution. In response to Petitioner's written request, the State provided a bill of particulars, according to which the State sought to prove that Petitioner endangered her children when she "left her *children* unattended without supervision in the residence creating a risk of harm *to Jameeqkwa and Shayla Kates.*" *[Emphasis added].*

Therefore, even under the State's proposal, Petitioner was prosecuted twice for her offense against her son, Jameeqkwa, in violation of her Fifth Amendment right under the Double Jeopardy Clause.

CONCLUSION

For the reasons set forth herein and in Petitioner's Brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

6 December 2000

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